

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, 1961-62

AND IN THE MATTER of a complaint by Mrs. Mildred Fortey that she has been discriminated against by Middlesex Creamery Limited in that she is paid at a rate of pay less than that paid to male employees doing the same work in the same establishment.

TO: The Ontario Human Rights Commission

Pursuant to my appointment by the Minister of Labour as a Board of Inquiry under the Ontario Human Rights Code 1961-62, I presided at a hearing on May 7, 1968 at the Moot Court Room of the Faculty of Law at the University of Western Ontario to inquire into Mrs. Fortey's complaint. At the hearing Middlesex Creamery Limited was represented by Mr. R.J. Lamon, Q.C., and the Ontario Human Rights Commission by Mr. E. Marshall Pollock. The thorough preparation and fair presentation of counsel were of great assistance and made a difficult task considerably easier.

The substance of the complaint itself was that the respondent, Middlesex Creamery Limited was violating Section 5 of the Ontario Human Rights Code 1961-62, which prohibits an employer from discriminating between his male and female employees by paying a female employee at a less than that rate of pay, paid to a male employee employed by him for the same work done in the same establishment. The particulars of Mrs. Fortey's complaint read as follows:

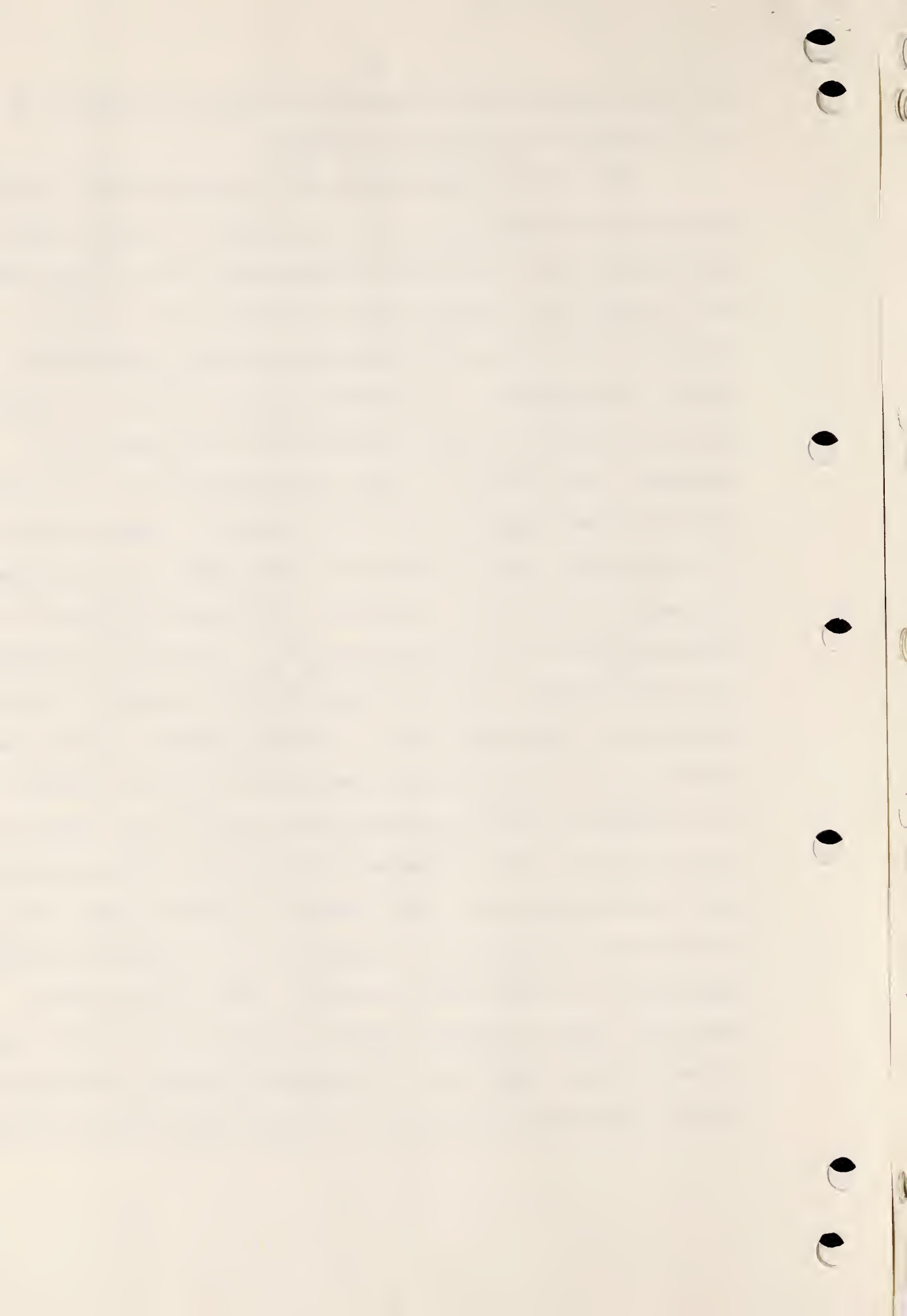
"I have worked as egg grader for Middlesex Creamery Ltd., London, Ont. for the past seven years continually. I was placed on the present automatic egg grading machine in January 1966. Since that time I have performed exactly the same egg grading work as my two male co-workers. To the best of my knowledge there is absolutely no difference in work and circumstances of work on the machine compared

to my male co-workers. I am receiving at this time \$1.70 per hour, while the male employees are receiving \$1.91 per hour for the same type of work. I feel I have been discriminated against in not receiving equal pay for equal work."

To make the issue in this matter clear it is necessary to sketch some of the background of the present situation at Middlesex Creamery Limited. Mrs. Fortey is a married woman and the mother of seven children. She first went to work for the respondent company in February 1956 and was employed at packing eggs until some time in 1957 when she started grading eggs. Her first period of employment with the respondent ended in July 1957 when she left because she was expecting a baby. In May 1960 Mrs. Fortey was called back to work by the General Superintendent of Middlesex Creamery as temporary help for the summer as an egg grader and, as an opening in the permanent staff later occurred, she remained in the employ of the respondent from the date of her recall to the present time during all of which period of time her job classification has been that of an egg grader. While the job classification has remained the same during this period the tasks involved in the job have changed with the introduction of newer and more modern equipment. In 1960 the egg graders used individual machines for grading. A few years later the respondent installed new equipment known as Barker egg grading machines. The explanation given at the hearing of the egg grading process involved in the use of the Barker was that a team of three persons worked on a pair of machines set together, one grader on each side and another on the vacuum lifter. These three graders rotated positions so that at the end of a three hour period each grader

would have worked two hours on grading (one hour on each side of the pair of machines) and one hour on the lifter.

The team of graders working with the Barker machines consisted of both male and female graders and at this point of time, the work of the male egg grader involved some physical labour that the female grader was not called upon to perform. The male members of the team were required to lift cases of thirty dozen eggs, weighing perhaps forty pounds, onto the machine. For the female grader, however, the respondent installed conveyors or rollers so that manual lifting would not be necessary. Thus, with the use of the Barker machines, the work performed by male and female employees was not the same work. Whether the difference was so significant that the work was not substantially the same during this period of time it is not necessary to determine; all parties at the hearing appeared to be in agreement that Mrs. Fortey's work on the grading team using the Barker was not "the same work done" by her male co-workers, although, to be completely accurate, it would appear that when the Barker machines were first installed some time elapsed before the conveyors were put in during which the female graders were required to lift cases to the same extent as the men. The Barkers were replaced by a more automated type of machine, known as the Page Automatic P.A.-60, in January 1966 and the introduction of this piece of equipment was an occurrence of fundamental significance to the issue before the Board. Before turning to this development, however, attention should be directed to the fact that under the Barker machine regime there was a differential between the rate of pay for a male grader and the rate for a female grader perhaps reflecting



the greater amount of physical exertion required of the male grader. The extent of the differential may be seen by examining the collective agreement that was in force from April 1, 1965 to March 31, 1967, and which covered a bargaining unit that included egg graders. This collective agreement, entered into between the respondent company and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, hereafter referred to as the Union, contained a Wage and Classification Schedule from which the following is an extract:

<u>"</u> <u>CLASSIFICATION</u>	<u>EFFECTIVE</u> <u>MAY 3/65</u>	<u>EFFECTIVE</u> <u>DEC. 6/65</u>	<u>EFFECTIVE</u> <u>JULY 4/66</u>	<u>EFFECTIVE</u> <u>DEC. 5/66</u>
Egg Grader-inexper.	1.59	1.62	1.65	1.69
" " -after 3 mo.	1.65	1.68	1.71	1.75
" " -after 6 mo.	1.81	1.84	1.87	1.91
Egg Grader(F)-inexper.	1.33	1.36	1.39	1.43
" " -after 3 mo.	1.50	1.53	1.56	1.60
" " -after 6 mo.	1.60	1.63	1.66	1.70 "

Thus with reference to egg graders who had more than 6 months experience, a male grader was paid twenty-one cents more per hour than a female grader.

The term of the collective agreement previously referred to, it will be recalled, did not expire until March 31, 1967. It was therefore prior to the expiration of that collective agreement that the crucial event occurred, namely the installation, in January 1966, of the Page Automatic PA-60 replacing the Barker machines which were in use when the collective agreement was entered into. This new machine continued to require the employment of a team of three persons, two of whom "grade", or perhaps, more accurately scan, the eggs from opposite sides of the

machine and the other of whom works at the vacuum lifter and all three of whom rotate jobs every hour. As a team, these employees, for some time now, Mrs. Fortey and two men Donald Mills and Robert Johnson, work from 8:00 A.M. to 4:30 P.M. five days a week. For the purpose of this Report, it would be of little value to outline in detail the evidence relating to the operations involved in the functioning of the Page machine. It will suffice to say that the purpose of the team^{is} to allow only Grade A eggs to go through the machine which is programmed to run sixty cases of thirty dozen eggs through the machine every hour. The significant change is that the employee who for the time being is working at the lifter position, whether that employee be a man or a woman, is no longer required to do any lifting. Labourers, called "floormen", place the crates of eggs on rollers and the employee at the lifter position operates a conveyor belt which is engaged by a pedal switch on the floor. He or she then opens the crate, removes the top trays and then employs the vacuum lifter to lift thirty dozen eggs and set them over a washer where they are released by pressing a button. After being washed automatically, the eggs go over the candler where the graders remove the cracked and blood-spotted eggs. The point that requires emphasis, however, is that each member of the team alternates at the three positions with the result that there is now nothing that distinguishes the task which a male member of the egg grading team performs from that performed by a female member. The very frank evidence of Mr. Malcolm Dennis, the president of Middlesex Creamery Limited, given at the hearing puts this question beyond dispute. To the question, put to

him by Mr. Lamon, whether, with the new automatic egg grading machine installed in January 1966, there was any difference between the work of the male and the female operators as far as the egg-grading operation was concerned, his unhesitating reply was "absolutely not".

Having reached the conclusion that since the Page machine went into production in early 1966, the work that Mrs. Fortey was doing as an egg-grader was identical with the work done by her male co-workers. In their capacity as egg-graders, it is necessary to review the experience and quality of performance of Mrs. Fortey as an egg-grader with relation to the experience and quality of performance of the two male members of the egg-grading team who, it will be recalled, are Messrs. Donald Mills and Robert Johnson. It has already been pointed out that Mrs. Fortey has been employed by the respondent company since February 1956 with an absence, for family reasons, of almost three years from July 1957 to May 1960 and that she has an uninterrupted record of employment with the company since May 1960 during all of which period she has performed the tasks involved in her present job classification, egg grader. Mr. Robert Johnson has been employed by Middlesex Creamery since May 1957 but, as an egg grader, which, in my view, is the relevant work experience for me to be concerned with, he has been employed for a considerably shorter period of time than Mrs. Fortey, that period being about four to five years. Mr. Donald Mills, on the other hand, has been employed by Middlesex Creamery for about three years and as an egg grader for slightly more than a year and a half. It is thus apparent that although Mr. Johnson's uninterrupted period of employment is slightly longer than Mrs. Fortey's, her uninterrupted

period of employment is considerably longer than that of Mr. Mills and her record as an egg grader is considerably longer than that of either Mr. Johnson or Mr. Mills. It is only fair to point out, only for the sake of completeness, because, in my opinion, it is not relevant to the issue which I have been asked to determine, namely, whether Mrs. Fortey is being paid less than her male co-workers for egg-grading, that Mr. Johnson comes to work a half hour earlier than either Mrs. Fortey or Mr. Mills, to prepare the Page machine for the beginning of egg-grading operations at 8:00 A.M. and that he works on Saturday every three months, performing what are essentially labourer's tasks, labourer being a lower job classification than egg-grader under the governing collective agreement. Mr. Mills too, it appears, performs periodic Saturday work of a labouring kind but it should be pointed out that for this extra work both men are paid overtime and that when overtime egg grading is required both men and Mrs. Fortey are employed. It is my view, though, that on a proper analysis of the problem before me, I am concerned only with the regular egg-grading work that is performed between 8:00 A.M. and 4:30 P.M. five days a week and the overtime egg grading work that is performed by the three members of the egg-grading team.

The evidence, then, persuades me not only that the work performed by Mrs. Fortey as an egg-grader is the same as that performed by her two male colleagues, but also that her seniority as an egg grader is greater than that of either man. I must now turn to the question of the respective rates of pay received by the members of the team at the date the complaint

was made and at the present time. I have shown that the collective agreement which provided for a differential of twenty-one cents between experienced egg graders and experienced female egg graders, contained a term which expired March 31, 1967. That agreement was succeeded by the current collective agreement which, though made June 14, 1967, is for a term from April 1, 1967 to March 31, 1969. The current collective agreement was signed, and negotiations preceding the signing occurred, at a time when the new Page machine, abolishing, as it did, the distinction between work performed by a male egg grader and that performed by a female egg grader, was in full production, its installation having taken place in January 1966. The evidence is clear that at the insistence of the respondent company a differential between the wage rate paid to male egg graders and that paid to female egg graders, of whom Mrs. Fortey is the only one, was reluctantly agreed to by the Union and incorporated into the new collective agreement. The rates of pay are set out in a schedule to the current collective agreement from which the following extract are the relevant provisions:

<u>" CLASSIFICATION</u>	<u>EFFECTIVE</u> <u>June 19/67</u>	<u>EFFECTIVE</u> <u>Oct.4/67</u>	<u>EFFECTIVE</u> <u>Apr.1/68</u>	<u>EFFECTIVE</u> <u>Sept.30/68</u>	
Egg Grader	2.05	2.10	2.20	2.25	
Egg Grader-(F)	1.85	1.90	2.00	2.05	"

The differential under the current agreement is therefore twenty cents as opposed to a differential of twenty-one cents under the predecessor agreement. If the differential was justified by the different nature of the work

performed by male egg graders at the time the predecessor agreement was entered into, that justification disappeared when the Page machine was fully operating and certainly at the time of the negotiations for the current collective agreement.

On all the evidence, therefore, I must make the following conclusions:

- (1) From at least February or March 1966, when the Page Automatic PA-60 became fully operative, the work performed by Mrs. Fortey as an egg grader in the respondent's plant has been the same as that performed by Messrs. Johnson and Mills as egg graders in the same plant.
- (2) Until April 1, 1967 Mrs. Fortey was paid twenty-one cents an hour less than Messrs. Johnson and Mills for egg grading and since April 1, 1967 she has been paid twenty cents an hour less than these two men.
- (3) These differences in rates of pay are not based on any factor other than sex.

A word or two should be said to illustrate the validity of the third conclusion mentioned above. In his evidence at the hearing, Mr. Dennis, the president of Middlesex Creamery Ltd., made it clear that in his view, and his view represented that of the respondent company, the introduction of the Page machine justified classifying the job of an egg grader as a female job, with the result that company hoped that eventually Messrs. Johnson and Mills would move on to other jobs in the plant leaving the way clear to hire female employees to fill their vacancies at the

lower rate of pay. To this end the company insisted that the current collective agreement should reflect the company's intention. Accordingly, the collective agreement contains the following provisions in that part of the agreement entitled "Wage Administration Policy":

" C EGG DEPARTMENT (ONLY)

1. The vacuum lift operation will be shared equally among the three graders who are working on the machines where this operation is required each day.

B

Male Graders - The present male egg graders will remain on male rates so long as he (sic) remains in the employment of the company, or successfully bids on another classification. The vacancy created will be posted as a female classification."

I will come back to comment on the company's position shortly, but I should now state my conclusion that I am satisfied that in paying Mrs. Fortey less than the male egg graders the respondent company has been violating public policy as expressed in Section 5 of the Ontario Human Rights Code 1961-62 and, more particularly, the very terms of Section 5 which reads as follows:

"5.-(1) No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment.

(2) A difference in the rate of pay between a female and a male employee based on any factor other than sex does not constitute a failure to comply with this section. "

Before setting out my recommendations, and to make them more comprehensible, I must return to the matter of the respondent company's position as expressed by its president, Mr. Dennis, who, I feel, does not appreciate that in

insisting on the incorporation into the collective agreement of the provisions I have referred to, the company was contravening the provisions of the Code. The respondent company appears to have the view that it cannot be in breach of the law if it is complying with the terms of a collective agreement entered into by an employer and a union in good faith. At the hearing, the respondent emphasized the role of the union in assisting Mrs. Fortey in bringing the matter before the Ontario Human Rights Commission at a time when hard bargaining was taking place between the respondent and the union. The argument seems to be that the union having specifically agreed to the different treatment of female egg graders, Mrs. Fortey as a member of the bargaining unit cannot be heard to complain. In the alternative, according to this view, the laying of the complaint was for an ulterior motive, namely to strengthen the bargaining position of the union in its negotiations with the respondent. I do not think very much need be said about these positions except that I am convinced they are untenable. Surely, it is not the law of Ontario that an employer and a union, entitled to bargain on behalf of an employee, can so agree as to deprive that employee of the basic human rights which the Ontario Human Rights Code seeks to protect. It is doubtful that the public policy of this Province would permit an individual on his own behalf to contract out of his human rights. Furthermore, even if the union, in assisting Mrs. Fortey to enlist the aid of the Commission, was doing so as a bargaining tactic, a conclusion which I do not believe is supported by the evidence, I cannot see how such a tactic can operate to prejudice Mrs. Fortey's rights. It seems to me to be totally irrelevant to the issue raised by her complaint.

More important and deserving of much greater attention from the point of view of the educational value of human rights legislation, is the attitude which Mr. Dennis expressed when he said that the company felt that egg grading had now become a female job. This attitude seems to me to be a widely prevalent one in society and one which, as I understand the philosophy behind the Ontario Human Rights Code, modern legislation is designed to change. The purpose of the legislation is, it seems to me, to bring about equality between the sexes in the rewards of employment. The principle of the legislative policy must be "equal pay for equal work". Implicit in this policy is the assumption that if a given job can be done by both men and women and is done by both men and women, no distinction should be made in the rates of pay in respect of that work. It is a corollary of that policy, that in terms of employment opportunity, there will be no discrimination against men where men can do the job as well as women. On this aspect of the matter it would, I think, not be inappropriate to quote from the evidence of Mr. Dennis at the hearing:

"Q. So that men can do this job just as well as women and just as efficiently. These two men do this job just as efficiently as Mrs. Fortey and visa versa?

A. I would say they do, yes.

Q. Why do you call it a female job then? Isn't it just a job?

A. The job is -- the machine manufacturer classified it as a female job and ---

Q. Let me stop you here. How does the fact that a manufacturer classifies it -- how does that affect you if you didn't have any females working for you. If you couldn't get females would you just close up the machine?

A. We would pay males the female rate.

Q. How does a rate become a female rate?

A. Well, if the job is classified as a female job at a rate of pay, a male can do the job and get that rate of pay. We have no complaint about that."

"THE CHAIRMAN: Implicit in what you say, Mr. Dennis, there seems to be an assumption that a female rate of pay is lower than a male rate of pay; is that correct?

A. That is correct in this particular case, sir, where the jobs were differentiated because of

THE CHAIRMAN: But when the question was asked what if a male can do it as efficiently as a female, you said "he would then be getting the female rate of pay".

A. The rate of pay agreed on for that job.

THE CHAIRMAN: But is it unfair to suggest that your assumption is that it may be the natural course of things that a female rate is not the same as a male rate but is different?

A. Not for doing the same work, sir. The female rate would not be lower for doing the same work.

THE CHAIRMAN: But when you say, though, that the male would be getting the female rate, don't you mean that he would be getting a rate that is lower than a male rate?

A. That's right.

THE CHAIRMAN: For the same work?

A. Yes. If this contract had been negotiated the way we had proposed, there would be -- would have been a rate of pay for an egg grader which would have been shown as egg grader --

THE CHAIRMAN: I see what you mean. I don't think this was clear from the answer.

A. Yes.

THE CHAIRMAN: What you are saying is that if you had had your way in the contract there would have been no male egg grader or female egg grader. There would have been an egg grader and the amount that the company would have had applicable to that job would have been the amount that the female was at that time getting or that you were prepared to give her at that time?

A. That's right, to get it plus the negotiated increase.

THE CHAIRMAN: But that would have been an amount which was less than what a male egg grader was then getting?

A. Yes."

"THE CHAIRMAN: But the result of negotiations seems to have put you in this position: this is the position you are now in, that in fact you are paying people for doing the same work -- we are talking about job classification "grader" -- a different rate and the difference is determined by the sex of the worker.

A. No. You are talking about the job as it is constituted now? No, the rate is not decided by the sex of the worker. It is decided by the contract that we are abiding by.

THE CHAIRMAN: I agree, obviously, but I mean that the contract makes the distinction.

A. That's right.

THE CHAIRMAN: --- which is the reason we are here, the distinction that a male would get twenty-one cents more than a female for doing the same work.

A. The male is getting overpaid.

THE CHAIRMAN: It may be that he is getting overpaid, but that is only because you say that the job can be done by a woman. How else can you say that he has been overpaid?

A. Well, if he -- if the female sex is prepared to accept the rate of pay we are offering and is happy with it, and if she is performing the work satisfactory to our satisfaction, then shouldn't we be allowed three females to do that same job if we are prepared and we are satisfied she can do that work?

THE CHAIRMAN: But that doesn't involve the assumption that it would cost you more for a male?

A. Well, uh, we are ---

THE CHAIRMAN: I know that is the difficulty.

A. I will put it this way: We could go in tomorrow morning with Mrs. Fortey and two other females and run that egg grading machine tomorrow and every day from now on.

THE CHAIRMAN: But you could also work with men only.

A. With men only, yes.

THE CHAIRMAN: Isn't this the position, really: For cultural or historical reasons there has been a distinction in our society between the amounts that employers are prepared to pay men and are prepared to pay women. As I understand the reasoning of this Act, the purpose of this legislation is to do away with that distinction, that no longer will you say, well, a man automatically gets paid more, and when you say or when anybody says that we can do the same job with just women, what you are really saying is that the market is such that you can get enough women to do this job at a more efficient cost price for you.

A. That's one way of looking at it, sir."

"THE CHAIRMAN: This is one of the problems of automation, but it also involves, it seems to me, assumptions that the legislation, modern legislation dealing with the place of women, was designed to overcome. Not your industry, but industry-wide and society-wide.

A. Well, I think if you wouldn't mind me saying so, sir, the one reason that some of these jobs are being classified as female jobs is because there is no future. There will be no future in this egg that we are doing within a few years. Within a few years it will be gone by the boards, so that is why -- why should a man study and read up to become a professional egg grader when it's almost not a planned obsolescence, but it will be done away with. There is no question about it.

THE CHAIRMAN: There can be no quarrel with this statement except for one assumption. I am sure if you asked the current Royal Commission on the Status of Women and all the people who were appearing before it, they would say your assumption is wrong, that it is a woman's job because it will essentially disappear. Why should a woman not aspire to as much as a man?

A. Well, a man has -- you know, must prepare his future with his pension and insurance and so on and this is not up to me to say, but this type of -- it is more of a transient job, this egg grader, today than it was a few years ago. It was a profession. When Mrs. Fortey used to do it it was a profession. Not to any of our planning, but it is just mechanization and modern equipment that has sort of done away with these jobs.

I do think that this whole matter that was brought about is as a result of our negotiations and this was one of the points that we wanted to be absolutely clear in straightening out and the complaint was laid in the middle of the negotiations and, you know."

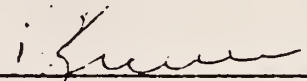
It is evident that we still have far to go in educating the public before the old patterns of thought and belief about the place of women are replaced by the more egalitarian views which twentieth century legislation attempts to encourage. This brings me to my major recommendation.

Having concluded that a violation of section 5 of the Ontario Human Rights Code has occurred and is occurring, it is not inconceivable that a recommendation might be made recommending that the offender be prosecuted. I do not make such a recommendation, however, because, in my judgment, having regard to the sincerity with which I believe the respondent entertains its misconception as to the propriety of its treatment of Mrs. Fortey, it does not seem to me that quasi-criminal sanctions are appropriate or would adequately vindicate Mrs. Fortey's rights. My recommendation is that Middlesex Creamery Limited be directed to pay Mrs. Fortey the difference between what she has been paid and what she would have been paid if no differential had existed for the period between the date on which the Page machine completely replaced the Barker machines and the date of payment whenever that should occur. I am sure that the Commission and Middlesex Creamery Limited can agree on the date when the Page machine became fully operational, but, in the event that agreement is impossible, I recommend that I be permitted to retain this matter for the purpose of hearing evidence on this point and making a determination of the date in question.

I would not want to conclude without again recording my appreciation and gratitude to Mr. Pollock and Mr. Lamon whose assistance at the hearing was invaluable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 22nd day of June 1968



Horace Krever

